

DOCUMENT RESUME

03321 - [A2373507]

[Protest against Omission of Davis-Bacon Act Provisions in Invitation for Bids]. B-195227. August 23, 1977. 2 pp. + enclosure (1 pp.).

Decision re: Westinghouse Electric Co.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Bureau of Reclamation.

Authority: Davis-Bacon Act (40 U.S.C. 276a). 4 C.F.R. 20.2(b)(1). 4 C.F.R. 20.2(c). F.P.R. 1-18.701-2. 52 Comp. Gen.

The protester objected to the award of a generator contract, arguing that the invitation for bids did not contain the provisions of and a wage determination under the Davis-Bacon Act although the contract involved substantial construction. The protest was untimely since it was filed after bid opening and was therefore not considered. The issues considered in previous decisions are not "significant" within the meaning of the provision which would permit consideration of an untimely protest. (Author/SC)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON D.C. 20548**

James Vickers

FILE: B-189227

DATE: August 23, 1977

MATTER OF: Westinghouse Corporation

DIGEST:

1. Protest, alleging invitation for bids should have contained provisions of Davis-Bacon Act (40 U.S.C. § 276a) because contract involved substantial construction, which was filed after bid opening is untimely under 4 C.F.R. § 20.2(b)(1) as failure to include provisions was apparent prior to bid opening.
2. Issues considered in previous decisions are not "significant" within meaning of GAO Bid Protest Procedures which permit consideration of protest notwithstanding protest's untimeliness when significant issues are involved.

Westinghouse Corporation (Westinghouse) has protested any award under invitation for bids (IFB) No. DS-7296 issued by the Bureau of Reclamation, Department of Interior, for the purchase and installation of generator/motor units for the Grand Coulee Pumping/Generating Plant.

Westinghouse argues that the IFB did not contain the provisions of and a wage determination under the Davis-Bacon Act (40 U.S.C. § 276a (1970)) as required by law. These provisions were required to be included by the Federal Procurement Regulations, specifically § 1-18.701-2 (1964 ed. amend. 115) which states that contracts for nonconstruction work which have substantial construction elements that are identifiable and segregable are required to contain the Davis-Bacon Act provisions. Westinghouse further contends that the FPR's give "the installation of heavy generators" as a specific example of the application of the Act and that is what is required under the instant IFB. Westinghouse states that the installation cost of the generators being procured exceeds \$1,000,000.

We note that the protest by Westinghouse was filed with our Office after bids were opened. Therefore, the protest is untimely under our Bid Protest Procedures (4 C.F.R. Part 20 (1977)), because § 20.2(b)(1) requires protests based on alleged improprieties which are apparent prior to bid opening must be filed prior to bid opening to be timely. The absence of the Davis-Bacon Act provisions

and wage determination was apparent from a review of the JFB and, accordingly, the protest is untimely.


Westinghouse argues that the protest raises issues significant to procurement practices and procedures and therefore is appropriate for consideration under 4 C.F.R. § 20.2(c) (1977). We have held that this exception to our timeliness rules has reference to the presence of a principle of widespread procurement interest, 52 Comp. Gen. 20, 23 (1972); MD Associates, B-184564, September 24, 1975, 75-2 CPD 181, and must be invoked "sparingly if our timeliness standards are not to become meaningless." Catalytic, Incorporated, B-187444, November 23, 1976, 76-2 CPD 445; COMTEN, B-185394, February 24, 1976, 76-1 CPD 130, affirmed B-185394, May 18, 1976, 76-1 CPD 330. We have also indicated that where the merits of a protest involve issues which have been considered in previous decisions, such issues are not "significant" within the meaning of 4 C.F.R. § 20.2(c). See Delta Scientific Corporation, B-184401, August 3, 1976, 76-2 CPD 113.

This Office has, on several occasions, issued decisions regarding the applicability of the Davis-Bacon Act to contracts involving a mix of services, supplies and construction. See 50 Comp. Gen. 807 (1971); B-178159, June 6, 1973; D.E. Clark, B-146824, May 28, 1975; 75-1 CPD 317.

Particularly applicable to the issue now being raised by Westinghouse is B-178159, supra, where we interpreted section 18-703 of the Armed Services Procurement Regulation, containing language similar to the current FPR § 1-18.701-2. See also Westinghouse Electric Corporation, 51 Comp. Gen. 822 (1972).

Counsel for Westinghouse also argues that under our decisions in High Voltage Maintenance Corp., 56 Comp. Gen. 160 (1976), 76-2 CPD 473, and 53 Comp. Gen. 412 (1973), we should consider that the protest raises a significant issue. Both of these cases involved whether Service Contract Act (SCA) provisions should have been included in a solicitation. We stated we considered the issue significant because of the frequency of SCA procurements and the Department of Labor's position in recent related protests before our Office evidenced the presence of a widespread interest in the issue. The instant protest is the first one involving the applicability of the Davis-Bacon Act with respect to the instant issue filed with our Office in over 2 years and, therefore, we find the two prior cases not controlling.

In light of the foregoing, the protest is dismissed.

Acting 
Comptroller General
of the United States



James Vickers
Proc. I

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20546

IN REPLY
REFER TO: B-189227

August 23, 1977

Mr. Xavier M. Vela
Administrator
Wage and Hour Division
United States Department
of Labor

Dear Mr. Vela:

This will acknowledge receipt of your letter dated June 29, 1977, concerning the protest filed with our Office by Westinghouse Electric Corporation against the award of a contract under solicitation No. DS-7296, issued by the Bureau of Reclamation.

In your letter you state that it is your opinion that the protest "raises issues significant to procurement practices and procedures" and, therefore, the untimeliness of the protest should be waived under section 20.2(c) of our Bid Protest Procedures (4 C.F.R. part 20 (1977)).

Enclosed is a copy of our decision of today holding the protest to be untimely filed under 4 C.F.R. § 20.2(b)(1). As noted in the decision, our Office has issued a number of decisions in this area and, therefore, we did not find that the protest raised a significant issue under our Procedures.

Sincerely yours,

R. F. K. 11/11
Acting Comptroller General
of the United States

Enclosure